BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-7342a
File: 20-215220 Reg: 98044554

THE SOUTHLAND CORPORATION and MARTIN D. TOM dba 7-Eleven
900 Clement Street, San Francisco, CA 94118,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: April 11, 2002
San Francisco, CA

ISSUED MAY 29, 2002

The Southland Corporation and Martin D. Tom, doing business as 7-Eleven (appellants), appeal from a Decision Following Appeals Board Decision[1] of the Department of Alcoholic Beverage Control which suspended their license for 25 days for their clerk selling an alcoholic beverage to a minor decoy, in violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation and Martin D. Tom, appearing through their counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The Department's Decision Following Appeals Board Decision, dated November 20, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. In the initial appeal, appellants argued that subdivisions (b)(2) and (b)(5) of Rule 141 were violated. The Department argued, with respect to Rule 141(b)(2), that appellants had not raised the issue until their appeal and, therefore, had waived it as a defense.

In its decision, the Appeals Board said:

> "The ALJ made the following finding as to the appearance of the decoy (Finding of Fact III-A):
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> > 'Gary Kishida (hereinafter 'the minor') is a clean-shaven, five feet and seven inches tall male person, weighing 135 pounds, whose physical appearance is such as to reasonably consider him being under the age of 21 years. Mr. Kishida, at the time of the sale, had close-cropped black hair the top of which had been subject to a red dye. The minor's appearance at the time of hearing was substantially the same as his appearance at the time of the sale by Respondent's clerk on July 24, 1998.'
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> "But for the fact that appellants did not raise the issue of the decoy's appearance at the hearing, this case would be similar to a number of earlier cases where the Board has held that the ALJ erred in his determination that the decoy's appearance complied with Rule 141(b)(2), by limiting his assessment to the decoy's physical appearance and ignoring other considerations which might bear on the appearance displayed by the decoy. (See, e.g., Circle K Stores, Inc. (1999) AB-7080; Circle K Stores, Inc. (1999) AB-7108.)
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> "It is true, as the Department reminds the Board, that Rule 141 provides that a violation of subdivision (b)(2) gives rise to a defense. Ordinarily, then, where a party fails to suggest that any of the provisions of the rule have been violated, it would be contrary to settled law to consider that issue on appeal.
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> "Here, however, the Administrative Law Judge addressed the issue, and in doing so applied an erroneous standard. By limiting his assessment of the decoy's appearance to his physical appearance, and ignoring (or at least failing to indicate that he took into account) other considerations which might bear upon the appearance of the decoy, he erred in his application of Rule 141(b)(2). (See, e.g., Circle K Stores, Inc. (1999) AB-7070; Circle K Stores, Inc. (1999) AB-7108.) Given that this incorrect application of the rule was not apparent until the proposed decision was issued, appellants' raising of the issue in their appeal is not untimely."

The Board affirmed the Department's decision with respect to the Rule 141(b)(5) issue, but reversed the decision and remanded the matter to the Department "for reconsideration in light of the comments herein regarding Rule 141(b)(2)."

The Department subsequently issued its Decision Following Appeals Board Decision in which it amended Finding of Fact III-A of its decision by adding to the language quoted above, the following:

> "While this physical description of the minor is provided as part of the factual summary, Respondents have not raised any issue regarding compliance with Rule 141(b)(2) (title 4, California Code of Regulation, §141(b)(2)). As such Respondents have waived this as a defense to the violation alleged, and the issue of compliance with Rule 141(b)(2) is not properly before the Department. (See, generally, Wilke & Hollzheizer, Inc. v. Department of Alcoholic Beverage Control (1966) 55 Cal.Rptr. 23; Harris v. Alcoholic Beverage Control Appeals Board (1961) 17 Cal.Rptr. 167, 170; Chang (2001) AB-7555; Tesfayohanes (2000) AB-7321.)
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> "As the Board rightfully concluded in Chang (2001) AB-7555, wherein they addressed the identical issue:
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> > 'The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before the body and to endow them with a dignity beyond that of a mere shadow-play. Had [appellant] desired to avail [itself] of the asserted [defense], it should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, *and the hearing officer might have made appropriate findings thereon.* [Emphasis added by the Board.] (See Harris v. Alcoholic Beverage Control Appeals Board, supra, 17 Cal.Rptr. at 170.)'"

Appellants have now appealed from this decision of the Department, contending that the Department has simply ignored the Board's prior decision.

DISCUSSION

Appellants argue that the Department did not reconsider the 141(b)(2) issue, but merely decided that it did not need to reconsider the issue, since appellants did not raise the issue at the hearing. However, appellants point out, the Board had already decided that the issue was properly raised on appeal.

Appellants are correct that the Board had already decided that the Rule 141(b)(2) issue was properly raised on appeal. The Department had limited its argument in its appeal briefs to its contention that the issue had been waived since it was not raised at the hearing. After a full consideration of the facts and the arguments, the Board said: "Given that this incorrect application of the rule was not apparent until the proposed decision was issued, appellants' raising of the issue in their appeal is not untimely." The Board could hardly have been more clear.

The Department obviously did not agree with the Board's decision. Certainly it is entitled to disagree; however, it is not entitled to simply overrule the Board's decision on a question of law. If it disagrees with an Appeals Board decision on a question of law, its remedy is to petition the appellate court for a writ of review. The appellate court, if it disagrees with the Board's decision, is entitled to reverse the Board's decision.

The procedure of petitioning for a writ of review is the only remedy in such a situation, *even if the Board's decision is simply wrong on a matter of law.* There is no procedure for the Board to reconsider its own decisions.[2] If the Board issues an

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[2]Business and Professions Code §23089: "Final orders of the board may be reviewed by the courts specified in Article 5 (commencing with Section 23090) of this chapter within the time and in the manner therein specified and not otherwise."

erroneous legal decision, neither the Board nor the Department can themselves do anything to correct that decision.[3] Only the appellate court is empowered to order the error corrected, and then only if a party petitions the court for a writ of review.

We are compelled to again reverse the Department's decision. This will give the Department the opportunity to properly reconsider the matter in accordance with the Board's order or follow the proper procedure to petition the appellate court for a writ of review.

ORDER

The decision of the Department is reversed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]Exceptions are limited to the Board issuing corrections of clerical errors or other such errata, or the Department causing legislation to be passed to change the result in future cases. The Department may also (and apparently has, in some instances) ignore the effect of a decision and not apply it in other cases. In such a case, the Board is not empowered to do anything directly; an interested party must bring the issue before the Board or the appellate court in a particular case.

[4]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.